Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

DAVID WEBER,

Petitioner,

v.

STRIPPIT, INC., IDEX CORP. and JAMES BLACKSTONE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In an age and disability discrimination case, is a plaintiff entitled to a McDonnell Douglas jury instruction?

The Eighth Circuit ruled "we have previously rejected the claim that a district court should instruct the jury on the McDonnell Douglas burden-shifting framework."

2. Is a person who suffers from repeated hospitalizations because of heart attacks and cardio-vascular disease, and whose un-rebutted expert testimony is that he has a physical or mental condition that substantially impairs a major life function, entitled to have a jury decide if he is disabled, even though he continues to be a productive employee?

The district court emphasized the Petitioner's ability to work and thereby found Petitioner not disabled. The Eighth Circuit upheld the district court.

3. In an age discrimination case, can a Respondent intentionally use all its peremptory challenges to strike prospective jurors over age fifty, thereby skewing the jury pool?

The Eighth Circuit ruled that the intentional exclusion of prospective jurors over age fifty is permissible even in an age discrimination case.

4. In a claim of perceived disability discrimination, was it error for the trial court to insist on focusing on "working" as the perceived disability, over objection and to refuse to give a reasonable accommodation instruction?

The Eighth Circuit ruled that there is no duty to accommodate a perceived disability and the focus on "working" was not error.

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The opinion of the Court of Appeals for the Eighth Circuit is reported at 186 F.3d 907 and is reproduced in Appendix A. The memorandum opinion of the United States District Court for the District of Minnesota, Fourth Division is unpublished and is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion on July 29, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

The relevant portions of the ADA, 42 U.S.C. § 12101, *et seq.*, are reproduced in Appendix C.

STATEMENT OF THE CASE

Petitioner was hired by Respondents as an International Sales Manager for Asia in 1990. He was a huge success. Each year of Petitioner's employment, sales in Asia increased substantially. In two years, by 1992, they were up six-fold and exceeded all other non-North American sales combined. Everything was going very well for Petitioner. He had no negative performance reviews nor other negative occurrences through the end of 1992. He was chosen for awards, got commission increases, salary raises and was well-regarded. Petitioner was the most successful salesperson Respondent Strippit ever employed.

On February 2, 1993, at age 54, Petitioner suffered a significant myocardial infarction as well as cardiac arrest. He was taken by ambulance to a local emergency room and remained in intensive care and cardiac care for about nine days. Petitioner was placed on physical and work restrictions.

About a month later, Petitioner again was hospitalized for his heart condition.

Petitioner spent six days in intensive and cardiac care. Petitioner underwent angioplasty procedures and other testing. Petitioner was placed on strict physical limitations and was ordered by his doctor not to work for nearly two months. He was placed on medication. Unfortunately, Petitioner's condition did not stabilize. His cardiovascular disease and hypertension continued to cause Petitioner substantial problems throughout the remainder of his employment.

On numerous additional occasions in 1993 and 1994, Petitioner was rushed to emergency rooms for his cardiovascular disease. On each occasion, he spent days in the cardiac or intensive care in the hospital. Petitioner collapsed on several occasions and continued to experience, among other symptoms, chest pains, shortness of breath, nausea, fatigue and body sweats. Today, Petitioner continues to be plagued by cardiovascular disease and hypertension.

Despite his substantial medical problems, Petitioner continued to perform his job at a record level. In 1993 Petitioner surpassed 1992's record performance by nearly 30%, which was the previous record year for Strippit in Asia. From the time Petitioner was hired, sales in the Petitioner's area of responsibility had increased approximately nine-fold.

Respondents were aware of Petitioner's medical condition and his hospital stays. Respondents admitted to considering Petitioner's health in making decisions about his employment and continuation thereof. Respondents also admitted that they were concerned about the Petitioner's health and that he was not going to be living much longer. Respondents started putting in place the mechanism to remove him from his job.

Right up until his termination, despite the Petitioner's physical limitations, he was able to fully and successfully perform his job responsibilities and continued to be the top performer.

In October 1993, just months after returning to work from his heart attack, Respondents told the Petitioner that he needed training. He was also told that there was a possibility that he would be required to relocate to Akron, New York. This was the beginning of an unbroken pattern of behaviors designed to get rid of Petitioner because of his heart disease.

Respondents treated Petitioner very badly. Respondents reduced Petitioner's commissions, threatened to fire him if he did not complete training, took away over half of his territory, ordered him to relocate, to Akron, New York, despite his doctors' orders not to relocate for six months, refused to abate the order to relocate, and instead fired him. All this despite Petitioner maintaining record sales levels for the company.

In early 1994 Petitioner's heart-related hospitalizations continued and Petitioner had another angioplasty. Petitioner's sales continued to be excellent and he remained Strippit's number one performer. However, in May, Respondents told Petitioner that he must attend extensive training and that "If satisfactory proficiency is not attained, it is unlikely we will have a suitable position for you within Strippit."

While maintaining his responsibilities in Asia, Petitioner completed the several month-long training schedule. Much of the training was useless for his position.

When Petitioner passed the training tests with flying colors, he was told by Respondents that he must succeed at even more training in order to keep his job, but he must first

re-locate to New York with no guarantee of ongoing employment before that training and tests will occur.

During this same time period, Respondents began employment discussions with Mr. Ochs, who is approximately twenty (20) years younger than the Petitioner, and had no health issues. Mr. Ochs was hired in August 1994 as an Asian Sales Manager and was given a vast portion of the Petitioner's territory, and then when Petitioner was terminated a few months later, took over his position.

Petitioner's Doctors informed Respondents that Petitioner should remain in Minnesota for six months for medical reasons before advising him on whether he could move to New York. Petitioner made it clear to Respondents that relocation presented serious health concerns for him.

The doctors indicated that Petitioner's case was complicated and needed consistent treatment. The doctors also indicated that Petitioner's life was endangered by the stress of moving and that stress triples the chances of relapse.

At trial, Dr. Johnson testified that Petitioner has several physical or mental impairments. These include permanent heart disease and hypertension. The nature and severity of these physical and mental impairments has affected virtually every aspect of Petitioner's life, including frequent hospitalizations, because of total heart-related incapacity, loss of physical ability, loss of stamina, loss of range of diet, drink, exercise, interference with thought, concentration and interacting with others. Almost nothing has not been affected.

The testimony of Dr. Johnson is that the impairments are permanent. Not only does Petitioner have permanent daily substantial impacts on many major life activities, but, he also is frequently totally disabled requiring hospital intensive care.

Here, Petitioner's testimony was that virtually every life activity was substantially limited by his documented "physical or mental impairments." After his original hospitalization, he was re-hospitalized more than a half-dozen times before his termination. This included two angioplasties being performed in less than a year.

Petitioner testified that his life has been substantially impacted in the area of performing manual tasks. All activities that require physical exertions are now either limited.

His heart condition, coupled with his hypertension causes Petitioner to have rational fears that his life is constantly at risk for sudden catastrophic heart attack resulting in death. His limitations include events as simple as walking up two flights of stairs, carrying a suitcase on an airplane, playing tennis with a friend. It also significantly restricts "walking." Petitioner's testimony was that the vast majority of his physical life is impacted by his heart disease. Petitioner also testified to shortness of breath, being a frequent result of his disability.

The activity of eating and drinking was substantially impacted as Petitioner now has to stick to a very restricted diet, excluding many foods he and the normal person previously could eat. Thus, in all areas involving physical activities he now has a limited range which will neither tolerate inactivity nor strenuous activity.

Petitioner testified that his thinking and interaction with others have been substantially impacted. He is constantly thinking about the limits his heart disease places on him and when coupled with his hypertension and disagreements with others.

Most importantly, Dr. Johnson, when given the legal definition of the ADA, testified that Petitioner does have

"physical or mental impairments" which "substantially limit" "one or more major life activities."

Since his heart attack, Petitioner has been required to take daily medication.

LEGAL ARGUMENT

A. *McDonnell Douglas* test

Petitioner requested that the jury receive an instruction regarding the *McDonnell Douglas v. Green*, 411 U.S. 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), burden-shifting analysis. The trial court refused.

This Court created the *McDonnell Douglas* test to assist in the proving of discrimination cases. It has been the centerpiece of analyzing fact sets to discern whether discrimination occurred for over a quarter century. Its validity as an evaluative tool is not lessened by the fact that now juries, not judges, make the factual determination in Title VII cases.

The standard burden-of-proof instruction, which indicates a Respondent has no obligation to present anything, is erroneous in Title VII cases. The Eighth Circuit's holding in this case that a trial court need not instruct the jury on what this Court holds the law on this issue is, in essence overrules this Court. The *McDonnell Douglas* burden-shifting test was created to allow plaintiffs to prove cases which would, without it, be unprovable. It did this by allowing the fact-finder to consider the explanation the Respondent gives for its behavior and whether it is worthy of belief.

This Court's holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), reminds that:

> The fact finder's disbelief of the reasons put forward by the Respondent (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the Respondent's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination . . .

(509 U.S. at 510-11).

It has only been recently that discrimination cases have become jury cases. Because of the complexity of the *McDonnell Douglas* burden-shifting test, this has sometimes led to the belief that a jury should not be given an instruction

This logic, however, deprives a plaintiff of the entire *McDonnell Douglas* methodology of proving his/her case. A jury is unlikely to intuit the test. If the jury does not know what the law is, it cannot apply it. Thus, leaving a plaintiff with, as this Court has noted, an impossible task.

Different courts are coming to different decisions on this matter. Unlike the Eighth Circuit, the Minnesota Supreme Court has found the *McDonnell Douglas* test a necessary instruction to a jury. *McGrath v. TCF Bank Sav.*, 502 N.W.2d 801, 806-07 (Minn. App. 1993), *aff'd as modified*, 509 N.W.2d 365 (Minn. 1993).[1]

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1. The Court of Appeals not only ruled that the *McDonnell Douglas* instruction need not be given, but also stated that Petitioner has waived the issue by not fully arguing it until his Reply brief.

The issue had been vigorously debated to the trial court. Petitioner then raised the issue in its initial brief and the Respondent argued it in its brief. Petitioner then explained the issue more fully in his Reply brief. The issue was not waived.

B. Actual Disability

In the present case, Petitioner's treating doctor testified as follows:

> Q. Having monitored Plaintiff's heart condition, would it be fair to say that he has a physical or mental condition that substantially impairs major life functions?
>
> A. Yes.
>
> * * *
>
> Q. Would it be fair to say, Doctor, not only from the medical tests that were performed on Mr. Weber, but also from your numerous contacts with him, that the reality of his heart condition substantially impacted every single aspect of this man's life?
>
> A. Well, not just his work life. It was also clear that he was having symptoms or episodes at times when he was at home and times that were not directly connected with work. So, yes. It certainly had an impact on his entire life.
>
> * * *
>
> A. So would it be fair to say if I were to give you the following word for — the following definition for the word "disability": The person has a mental or physical condition that substantially interferes or impacts on major life functions, would he fit that description?
>
> A. Yes.

* * *

Q. . . . Was it your professional opinion, based on your years of experience as a doctor, your training, and also your direct contact and observations of Mr. Weber, that for health reasons, it was inappropriate for him to relocate to Akron, New York, in the time frame of late summer, that is to say September, October, of 1994?

A. Yes, that was my opinion in September 1994.

* * *

Q. Did his heart disease substantially interfere with any major life functions?

A. Yes.

The evidence at trial revealed that Petitioner had numerous, acute episodes of total disability where he was hospitalized in intensive care about a dozen times. This was all interspersed with chronic heart disease, which even after taking medication impacted his ability to breath, walk, exercise, eat and live without fear of death. His cardio-vascular system was substantially impaired.

Respondent presented no medical testimony at all and did not rebut any of Petitioner's evidence. Despite Petitioner's evidence, the district court took from the jury the issue of whether Petitioner was disabled and granted a directed verdict on this issue. The fact-finder should have been allowed to decide this issue. There was ample evidence to allow the jury to render its judgment on the issue.

C. Age-*Batson* challenge

The trial in this matter involved a count of age discrimination. Respondent used its peremptory challenges to skew the jury by eliminating only those jurors who were over age fifty.

The Eighth Circuit in this case held "we decline to extend *Batson* peremptory challenges based on age." It continued to explain that "thus an age-based motivation for exercising peremptory challenges does not violate equal protection." The Eighth Circuit's holding is, thus, that a defense counsel can openly and intentionally use age as the sole basis for excluding jurors, even in an age discrimination case. This runs contra to this Court's guidance on other similar issues.

The jury pool consisted of 14 individuals, four of whom were over fifty. During jury selection, Respondent/ Respondent used all three peremptory challenges to strike jurors over the age of fifty. Petitioner challenged this use of peremptory challenges.

In response to Petitioner's *Batson* challenge, Defense Counsel outlined his career as an attorney and conclusionarily claimed he had ". . . legitimate reasons for doing what [he] did in selecting the jurors that [he] selected . . . " and claimed ". . . I shouldn't have to justify my actions as counsel any further than that."

Defense Counsel did not state a single specific reason for the exercise of any of his peremptory strikes on any of the age fifty or over prospective jurors, nor did he even discuss as a group, any reason why he struck the jurors he did.

The chances of all three of his preempts being used to strike these prospective jurors if age was not a factor are

astronomically small — .014. This is more than sufficient to prove statistically a discriminatory act.

In denying Petitioner's challenge, the trial court also did not state any specific reasons it concluded that the preempt was not improper, but stated:

> . . . it's an interesting issue. And it may be an issue that one of the Circuit Courts or the Supreme Court takes up soon as to an issue like this of age. But at this stage, I'm going to overrule the motion in this case.

In its post-trial order denying Petitioner's renewed request on this issue, the trial court did provide a factual basis for one of the three stricken potential jurors, but provided no basis for the other two.

Respondent's total silence on any specific reason for striking any of the over-fifty year old jurors and even the trial court's inability to provide any specifics at all for two of the three, leaves the record devoid of any justification for this behavior.

Long ago, this Court held that juries must be indiscriminately selected:

> without systematic and intentional exclusion of any . . . substantial portion of the community . . . that cannot be . . . excluded in whole or in part without doing violence to the democratic nature of the jury system.

Theil v. Southern Pacific Co., 328 U.S. 217, 220, 223, 66 S. Ct. 984, 985, 90 L. Ed. 1181 (1946). As this case involves claims of age discrimination, the exclusion of older jurors violated Petitioner's due process and equal protection rights.

This Court has applied this mandate specifically to the exclusion of jurors by race because it violates Fourteenth Amendment equal protection rights. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), the Court extended the *Batson* rationale to civil suits, holding that a private litigant in a civil case may not use peremptory challenges to exclude venire persons because of race. The concept has also been held to prevent exclusion based on gender. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). It has also been applied to prohibit strikes based solely on religion. *United States v. Sommerstein*, 959 F. Supp. 592 (E.D.N.Y. 1997).

The basis for all these rulings is the same - preempts are to be used to remove prospective jurors for individual reasons regarding their personal fitness to serve as a juror, not to skew the cross-section of society sought for juries by eliminating altogether a group of people based on their group identity.

Here, that is exactly what was done. The preempts were used to skew the jury in an age case by removing as many people as was possible in the group over age fifty. Undoubtedly, if Respondent's one challenge for cause had also been granted, 100% of those over fifty would have been removed.

Here, Respondent never even attempted to satisfy this burden. *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395 (1991).

When the very issue being tried is the exclusion of older workers from the work force, intentional exclusion of prospective jurors over fifty cannot be consistent with either

this Court's supervisory authority, nor the due process and/or equal protection clauses of the constitution.

This is both from the perspective of the potential juror and their interest in assuring their input in decisions of this nature as well as the Petitioner's interest in a fair trial.

D. Perceived disability

29 CFR Ch. XIV (7-1-98 Edition) Pt. 1630.2(l), App., p. 350 states:

> An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

Plaintiff vehemently objected to the lower court's instruction on perceived disability on several grounds. First, Plaintiff objected to the inclusion of substantial language about the major life activity of "working." Plaintiff informed the Court that it did not base his claim on "working." The instruction about "working" should not have been given over objection under the Regulations and case law. Second, Plaintiff contended Defendants' instruction was an actual, not perceived, disability instruction.

According to the federal regulations, courts should *first* look at major life activities *other* than working. "Working"

should be looked at **only** if none of the other major life activities apply:

> If an individual is **not substantially limited** with respect to **any other** major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any **other** major life activity, **no determination** should be made as to whether the individual is substantially limited in **working.**

29 CFR Ch. XIV (7-1-98 Edition) Pt. 1630.2(j), App., p. 348.

Beyond objecting to the instruction on "working" being given at all, Plaintiff also objected to the instruction on the grounds that it provided the "actual disability" definition of substantially limited in the activity of working rather than a "perceived disability" standard. Nowhere in the statutory language of "perceived disability" does it require that the employer must, in addition to regarding an employee as disabled from the job in which he is working, regard the employee as being disabled in a broad class or range of jobs in various classes.

This places an individual who is discriminated against because an employer regarded them as unable to perform their job on a much lower legal footing than a minority who was terminated because the employer did not feel they could do their job because of the color of their skin or the fact that they are a female. This is inconsistent with the legislative history of the ADA.

Throughout the trial, Plaintiff did not contend that he was disabled in the activity of working. He always contended that he was disabled or perceived to be disabled, in the other

life activities. The lower court, therefore, should not have even given the instruction regarding "working."

The court's instruction totally misdirected the jury away from the proper analysis as to whether the employer perceived Plaintiff as disabled because it feared he would die or had other irrational concerns about Plaintiff because of his impairment which motivated its numerous adverse actions against him.

Second, the instruction fails to address the direct evidence of discrimination which, if believed, does not require the analysis the instructions follow.

The instruction was, at minimum, confusing and failed to address Plaintiff's theory of the case at all. It directed the jury away from the very issue Congress sought to address — whether the employer, despite knowing full-well Plaintiff was fully able to perform his job, nonetheless got rid of him because of its own irrational biases against people with ongoing heart disease. Vice president Blackstone testified, under oath, that he not only considered disabilities generally in making employment decisions, but did so specifically in Plaintiff's case. He discussed with superiors in meetings about Plaintiff's future whether Plaintiff's diet was healthy and whether he would live in light of his heart disease.

Plaintiff never requested nor raised the issue that the major life function that was impaired was "working." Despite this, the district court insisted over Plaintiff's objection on focusing on "working" as the major life activity affected. It went on to tell the jury, in essence, that even if the Respondent felt Petitioner was unable to perform his job because of his physical impairment, or fired him because of bias or irrational fears about his heart condition, this would not constitute a perceived disability unless Respondent felt Petitioner was unable to perform a wide range of jobs.

Both the courts focus on working and the instruction it gave about it was erroneous and deprived Petitioner of a fair trial.

Respondent had considered Petitioner's disability in it's decisions about him. His direct supervisor testified about his meetings with the group that determined Petitioner's employment fate.

Respondent decision-makers discussed and considered Petitioner's health when deciding to terminate him:

> Q. All right. Were you concerned, then, that Dave may not, in fact, be able to continue working for Strippit because he was jeopardizing his health?
>
> A. I think I would rephrase that to say that I was concerned that he could not perform as we hoped he would because he may be jeopardizing his health.
>
> * * *
>
> Q. Yeah. Well, with — I think you told us you had meetings with Mr. Roberts, Mr. Hoag, and Mr. Simeone. So in those meetings, did you bring up your concerns about Dave's health?
>
> A. I believe I did.
>
> * * *
>
> Q. Okay. Do you recall what Mr. Roberts or Mr. Hoag or Mr. Simeone's reaction was to your concerns?

A. Shared the concern.

* * *

Q. I would assume that health is a factor that you are concerned about?

A. We are looking for individuals that we expect to work, you know, practically every day if there's business to be conducted. To that end, I would say that health is a concern, certainly.

Q. You're also looking for people who will be with you for a number of years, correct?

A. That would be our preference.

Q. So age also is a factor that you look at?

A. Age could be a factor.

* * *

Q. And one of those factors was his health, correct?

A. We were concerned about Dave's health problems.

Q. And that concern was discussed by the four of you who were discussing Dave, correct?

Q. And the four of you, again, is Rod, yourself, Wade and Tom Hoag, correct?

A. His condition was discussed, yes.

* * *

Q. So you didn't have any concerns that his heart condition or his health lifestyle might cause him to die?

A. I believe that I would consider him not to be candidate for longevity in perfect health.

Q. And did that raise the issues for you regarding his being able to perform his job?

A. If he did not have that authority from his physician or from his doctor, then it certainly would influence my opinion of how he could perform his job, his functions.

Q. And that was one of the issues you discussed with your three colleagues, correct?

A. Yes, I suspect you're right."

In this case, the Eighth Circuit held that an employer can terminate an employee specifically because of their heart condition. This is despite the fact that the employee is fully performing their job and could easily be accommodated.

The Court felt that it would be bizarre to expect an employer to offer reasonable accommodations to an employee they believed to be disabled (such as here, delaying a transfer to finish medical care), if, in a technical sense, the employee did not quite meet the "substantially impaired" standard in the Act.

This and other parts of the Court's ruling substantially collapses the "perceived" disability category into the "actual" disability box. It also wanders very far from the legislative intent behind the Act of preventing bias and prejudice about physical and mental conditions from depriving people of jobs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JULY 29, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-3392

David Weber,

Plaintiff/Appellant,

v.

Strippit, Inc.; Idex Corp.; James Blackstone

Defendants/Appellees.

Appeal from the United States District Court
for the District of Minnesota.

Submitted: June 16, 1999
Decided: July 29, 1999

Before RICHARD S. ARNOLD and ROSS, Circuit Judges, and BYRNE,[1] District Judge.

BYRNE, District Judge.

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1. The Honorable Wm. Matthew Byrne, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

Appendix A

David Weber appeals from the district court's entry of judgment on a jury verdict for his former employer on age and perceived disability discrimination claims and from the district court's grant of defendants' motion for judgment as a matter of law on his actual disability discrimination claim. We affirm.

I. BACKGROUND

In May 1990, Weber was hired by defendant Strippit, Inc. as an international sales manager for various Asian markets. Strippit is engaged in the manufacture of a broad range of tooling and machinery used to punch, bend, and shear sheet metal and employs approximately 400 hourly and salaried employees. After an initial training period at Strippit's headquarters in Akron, New York, Weber was officed out of his home in Minnesota.

On February 2, 1993, Weber, then 54 years old, suffered a major heart attack. Weber remained in intensive care for about nine days and was placed on physical and work restrictions. About a month later, Weber was again hospitalized for his heart condition and spent six days in intensive care. Following his second hospital stay, Weber was placed on strict physical limitations and was advised by his doctor not to work for nearly two months. On numerous occasions in 1993 and 1994, Weber was hospitalized for his heart disease, hypertension, anxiety, and related conditions. Weber continued to perform his job responsibilities throughout this period.

Beginning in October 1993, several months after Weber had returned to work following his second hospitalization,

defendants required Weber to complete further training and advised him of the possibility that he would be required to relocate to Akron.[2] In January 1994, Strippit reduced Weber's commissions and informed him that his employment could be terminated at any time. Weber underwent another angioplasty in early 1994. Starting in May 1994, defendants informed Weber that he must relocate to Akron.[3] Defendants eventually ordered Weber to either relocate to Akron or, if he was unwilling to leave Minnesota, to accept a position as a domestic sales engineer at a much lower salary. Weber told defendants that his doctor advised him to remain in Minnesota for six months for medical reasons prior to relocating. Defendants refused to wait the six months and, by the end of October 1994, Weber was either terminated or abandoned his employment.

Prior to trial, the district court dismissed numerous Minnesota tort law claims asserted by Weber. After Weber had presented his case at trial, the district court granted judgment as a matter of law for defendants on Weber's actual

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2. At trial, defendants stated that locating international sales managers in either their sales territory or at Strippit headquarters was an established policy and practice that had been uniformly applied to all of its international sales managers. Defendants further stated that they began discussing Weber's relocation with him as early as 1992 but that Weber cited a number of reasons, including concern for his wife's health and his desire to have his daughter complete high school in the Minneapolis area, for wanting to remain in Minnesota.

3. Weber continued to make frequent trips to Akron and to Asia throughout 1994.

disability claim under the Americans with Disabilities Act ("ADA") and Minnesota Human Rights Act ("MHRA") but denied defendants' motion for judgment on Weber's perceived disability and age discrimination claims. At the conclusion of trial, the jury returned a unanimous verdict for defendants. Weber filed a post-trial motion for judgment as a matter of law or, in the alternative, for a new trial, which the district court denied. Weber timely appealed.

II. DISCUSSION

On appeal, Weber contends that defendants violated the equal protection clause when they exercised their peremptory challenges to remove jurors over the age of fifty. Weber also asserts that the district court erred in granting judgment as a matter of law on his actual disability claim and in charging the jury.

A. *Peremptory challenges*

During jury selection, defendants exercised all three of their peremptory challenges to remove jurors over the age of fifty. At that time, and again as part of his motion for a new trial, Weber alleged that defendants violated his right to a representative jury through this use of their peremptory challenges. The district court rejected Weber's claim, finding it unlikely that the Supreme Court would expand *Batson v. Kentucky*, 476 U.S. 79 (1986), to prohibit peremptory challenges based on age and that, even if *Batson* did apply to age, defendants had sufficient age-neutral reasons for striking the three jurors.

Appendix A

In *Batson*, the Supreme Court held that the equal protection clause forbids prosecutors from striking jurors solely on account of their race. *Batson*, 476 U.S. at 93-94. The Court subsequently extended *Batson* to counsel participating in jury selection in civil cases, *see Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991), and to peremptory challenges based on gender, *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141-42 (1994). Where *Batson* applies, the party asserting an equal protection violation must make a prima facie showing that the other party exercised a peremptory challenge on the basis of race or gender; the burden then shifts to the challenging party to offer a non-pretextual race or gender-neutral explanation for their strikes. *See Davidson v. Harris*, 30 F.3d 963, 965 (8th Cir. 1994); *United States v. Brooks*, 2 F.3d 838, 840-41 (8th Cir. 1993).

Neither the Supreme Court nor any other court has extended *Batson* to peremptory challenges based on age. Several circuits, in fact, have expressly considered and rejected the claim that *Batson* applies to age-based challenges, and other circuits have accepted age as a legitimate race or gender-neutral factor for exercising peremptory challenges. *See, e.g., United States v. Maxwell*, 160 F.3d 1071, 1075-76 (6th Cir. 1998); *Howard v. Moore*, 131 F.3d 399, 408 (4th Cir. 1997); *United States v. Cresta*, 825 F.2d 538, 544-45 (1st Cir. 1987); *see also Barker v. Yukins*, 993 F. Supp. 592, 605 n.12 (E.D. Mich. 1998); *State v. Everett*, 472 N.W.2d 864, 869 (Minn. 1991).

We decline to extend *Batson* to peremptory challenges based on age. As the Sixth Circuit noted in *Maxwell*, "[t]he

practice of allowing peremptory challenges may be overridden only for the strongest constitutional reasons." *Id.* at 1076. Age, unlike race or gender, is not a suspect classification subject to strict or even heightened scrutiny under the equal protection clause. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976); *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 827 (8th Cir. 1998), *petition for cert. filed*, 67 USLW 3504 (U.S. Feb. 1, 1999). Thus, an age-based motivation for exercising peremptory challenges does not violate equal protection.

Even if *Batson* were extended to age-based peremptory challenges, the district court assessed the age-neutral reasons for defendants' exercise of their peremptory challenges and found them non-pretextual. Defendants had requested, for instance, that one of the three jurors be excluded because her brother-in-law had made claims of age discrimination against a former employer; when the court declined to strike the juror for cause, defendants exercised a peremptory challenge to exclude the juror. The district court further found that all three jurors' answers during voir dire could support defense counsel's view that the jurors were predisposed to rule against defendants. Because the district court's findings on discriminatory purpose were not clearly erroneous, *see United States v. Wiggins*, 104 F.3d 174, 176 (8th Cir. 1997), even a cognizable *Batson* claim would fail.

B. *Actual disability claim*

Weber's primary contention on appeal is that the district court erred in granting judgment as a matter of law for

defendants on his actual disability claim under the ADA and MHRA. Specifically, Weber contends that his heart disease automatically qualifies as a disability under the ADA and, even if it does not, that he presented sufficient evidence that his heart disease substantially interfered with one or more major life activities.

We review the district court's grant of a motion for judgment as a matter of law de novo. *See Schulz v. Long*, 44 F.3d 643, 647 (8th Cir. 1995). Judgment as a matter of law is appropriate if there is insufficient evidence to support a verdict for the non-moving party. *See Gray v. Bicknell*, 86 F.3d 1472, 1478 (8th Cir. 1996). The evidence is insufficient if no reasonable juror could have returned a verdict for the non-moving party. *Morse v. Southern Union Co.*, 174 F.3d 917, 922 (8th Cir. 1999). In making this determination, we view all facts and resolve all conflicts in favor of the non-moving party, giving him the benefit of all reasonable inferences. *See Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1212 (8th Cir. 1996).

The ADA proscribes discrimination by an employer "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). The MHRA similarly creates a civil cause of action against employers who discharge an employee because of a disability. Minn. Stat. § 363.03 subd. 1(2)(b); *see Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997). We have previously assumed, without deciding, that analysis of a disability claim under the MHRA mirrors analysis under the ADA. *See Roberts v. KinderCare Learning Ctrs., Inc.*, 86 F.3d 844, 846 n.2 (8th Cir. 1996). Because neither of the

parties in this case draws any distinction between the analysis under the two statutes, we proceed on the same assumption.

To obtain relief under the ADA, a plaintiff must prove that he was disabled within the meaning of the ADA, that with or without reasonable accommodation he was able to perform the essential functions of his job, and that the employer discharged him in whole or in part because of his disability. *See, e.g., Katz v. City Metal Co., Inc.*, 87 F.3d 26, 30 (1st Cir. 1996). The threshold issue is whether plaintiff had a "disability," which the ADA defines as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;[4]
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). An "impairment" is any physiological disorder, cosmetic disfigurement, or anatomical loss affecting one of the body's systems, or any mental disorder. 29 C.F.R. § 1630.2(h).

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4. The MHRA defines a disability as an impairment that "materially," rather than "substantially," limits one or more major activities. Minn. Stat. § 363.01 subd. 13. The difference is merely semantic, however, and we treat the standards the same. *See Snow*, 128 F.3d at 1206.

Appendix A

Guidance as to the meaning of "substantially limits one or more major life activities" is found in the regulations promulgated under the ADA. "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Sitting, standing, lifting, and reaching are also considered major life activities. *See Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997); *see also Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998) (emphasizing that the regulations provide an illustrative, rather than exhaustive, list of major life activities).

"Substantially limited" is defined as:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1630.2(j)(1). Factors to be considered in assessing whether an individual is substantially limited in a major life activity are:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment;

(iii) The permanent or long term impact, or the expected long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2). The Supreme Court has recently held that the determination of whether an individual is substantially limited in a major life activity must take into account mitigating measures such as medicines and assistive devices, thus overruling our holding to the contrary in *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997). *See Sutton v. United Air Lines, Inc.*, __ U.S. __, 1999 WL 407488, at *7-8 (June 22, 1999).

At the close of Weber's case, defendants moved for judgment as a matter of law on Weber's disability and age discrimination claims. With respect to Weber's claim of actual disability, defendants conceded that Weber's heart disease constituted an impairment under the ADA. Defendants argued, however, that Weber had not shown the impairment to substantially limit any major life activity. Defendants focused, in particular, on the major life activity of working. Defendants noted that Weber claimed only to be unable to relocate to a particular location and not to be restricted from working in an entire class or broad range of jobs. The district court granted defendants' motion for judgment as a matter of law on the actual disability claim.

Appendix A

On appeal, Weber asserts the curious claim that "[h]aving a fully functioning cardiovascular system is a major life activity," such that his heart disease qualifies *per se* as an actual disability under the ADA. This claim stems from his confusion among the terms "impairment," "major life activity," and "disability" as used in the ADA and related case law. All of the cases that Weber cites for the proposition that a fully functioning cardiovascular system is a major life activity state only that the absence of a fully functioning cardiovascular system (e.g., heart disease) is an *impairment* that, if it substantially limits *a major life activity*, may constitute a *disability*. That Weber's heart disease substantially impacts his cardiovascular system does not automatically render him disabled under the ADA.

The district court found, and Weber concedes, that Weber's impairment did not substantially limit the major life activity of working. However, Weber claims that the district court should have considered major life activities other than working and that, based on the testimony of Weber and his physician, a reasonable jury could have found that he was substantially limited in one or more major life activities. While Weber's physician offered his opinion that Weber was substantially limited in one or more major life activities, he repeatedly failed to identify any particular activity in which Weber was restricted as to condition, manner, or duration as compared to the average person in the general population. Weber did identify specific activities that were impacted by his heart disease, including eating, walking up stairs, shoveling snow, gardening, mowing the lawn, playing tennis, fishing, and hiking. Aside from eating and walking, however, none of these activities qualify as major life activities.

While Weber did face dietary restrictions and difficulty walking long distances or climbing stairs without getting fatigued, these moderate limitations on major life activities do not suffice to constitute a "disability" under the ADA. *See, e.g., Land v. Baptist Medical Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999) (holding that an individual is not actually disabled where, despite a severe allergic reaction to foods containing peanuts or peanut by-products, she can consume other foods and her physical ability to eat is not in any way restricted); *Kelly v. Drexel Univ.*, 94 F.3d 102, 106-08 (3d Cir. 1996) (affirming summary judgment for defendants on actual disability claim where impairment prevented plaintiff from walking more than a mile or so, altogether prevented him from jogging, and required him to pace himself on stairs). Moreover, even Weber's physician testified that Weber could engage in most forms of exercise, even strenuous exercise, despite his heart condition.

Because Weber "failed to present sufficient evidence to establish that the nature, duration, and long-term impact of his medical problems caused him to be substantially limited in a major life activity," *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996), the district court did not err in granting judgment as a matter of law.

C. *Jury charge*

Weber next claims that the district court erred in charging the jury by giving a flawed instruction on perceived disability and failing to give instructions on "record of disability," "reasonable accommodations," the *McDonnell-Douglas* burden-shifting framework, and mixed motives.

Appendix A

1. Perceived disability

A person may be disabled under the ADA if, notwithstanding the absence of an actual disability, he is perceived or "regarded as" having an impairment that substantially limits a major life activity. *See Sutton*, 1999 WL 407488, at *12. Weber claims that the district court's instruction on perceived disability was flawed in that it emphasized the major life activity of "working" and was more akin to an actual disability instruction than a perceived disability instruction.

The references in the district court's instruction to the major life activity of working were not improper. Although Weber did not claim that his heart condition in fact limited his ability to work, he did claim (and continues to claim) that defendants treated him as if it did. Because the jury was at least implicitly invited to find that defendants treated Weber as if he was unable to work, and because the regulations set forth specific requirements that must be met before a limit on an individual's ability to work may be deemed "substantial," it was important for the court to instruct the jury on these requirements. *See* 29 C.F.R. § 1630.2(j)(3); *see also Sutton*, 1999 WL 407488, at *14 ("When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege that they are unable to work in a broad range of jobs.").[5]

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5. While the Supreme Court has noted "some conceptual difficulty in defining 'major life activities' to include work," *Sutton*, 1999 WL 407488, at *14, the parties in this case accept that the term "major life activities" includes working.

Additionally, the district court did not limit its instruction to the major life activity of working. Rather, the court instructed the jury that it should find Weber disabled if defendants regarded his impairment as substantially limiting any major life activity, "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sitting, standing, lifting, reaching, or working." Thus, "the instructions, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury." *Morse*, 174 F.3d at 926.

Weber's claim that the court's instruction was more akin to an actual disability instruction than a perceived disability instruction also fails. Weber contends that the test for perceived disability is whether defendant treated plaintiff adversely because of his or her feelings about the plaintiff's physical or mental impairment. This is not the test. Rather, the test is whether defendant treated plaintiff adversely because it regarded him as having an impairment *that substantially limits one or more major life activities. See Murphy v. United Parcel Serv.*, __ U.S. __, 1999 WL 407472, at *4 (June 22, 1999); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995); *see also O'Keefe v. Varian Assocs., Inc.*, 1998 WL 417498, at *18 (N.D. Ill. 1998) ("For an employee to be disabled under this definition, it is not sufficient that an employer perceive an employee as having an impairment; the employer must regard the employee as having an impairment that substantially limits a major life activity.").

The court's instruction to the jury — that "it is your duty to determine whether defendants regarded plaintiff as having a physical impairment that substantially or materially limits a major activity . . . [n]ot whether plaintiff actually has such an impairment" — thus stated the proper test for a perceived disability claim.

2. Record of disability

Weber next claims that the district court erred in failing to give a "record of disability" instruction based upon his hospitalizations during his employment at Strippit. The ADA does proscribe discrimination based upon a documented history of having a physical or mental impairment that substantially limits one or more of the major life activities. However, regardless of whether the evidence in this case would have supported a record of disability instruction, Weber never requested the instruction below. Thus, our review is for plain error. *See Morse*, 174 F.3d at 926.

In order to have a record of disability under the ADA, a plaintiff's medical documentation must show that he has a history of, or has been misclassified as having, a physical or mental impairment that substantially limits one or more major life activities. 29 C.F.R. § 1630.2(k). Because Weber failed to establish any actual disability during his employment at Strippit, and the jury unanimously rejected his perceived disability claim, it is virtually inconceivable that the jury would have found for Weber on a record of disability theory. Thus, any error in failing to instruct the jury on record of disability is not the type of plain error that would result in a miscarriage of justice if left uncorrected.

3. Reasonable accommodations

Weber also contends that the district court erred in failing to give a "reasonable accommodation" instruction. Weber takes the position that an employer is liable under the ADA where it fails to reasonably accommodate either an actual or a perceived disability. The district court rejected Weber's position, holding that an employer need only accommodate actual disabilities and, because the court granted judgment as a matter of law on Weber's actual disability claim, no reasonable accommodation instruction was required. We agree with the district court.

The first element of a prima facie case of disability discrimination required Weber to demonstrate that he was "disabled" within the meaning of the ADA. The second element, which is the focus of the present analysis, required him to demonstrate that he was a "qualified individual," which the ADA defines as an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). This inquiry has two prongs. "First, a court must determine whether the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires." *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 145 (3d Cir. 1998) (en banc) (citing 29 C.F.R. pt. 163, app. § 1630.2(m)). "Second, it must determine whether the individual, *with or without reasonable accommodation*, can perform the essential functions of the position held or sought." *Id.* (emphasis added); *see also Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1111-12 (8th Cir. 1995).

Appendix A

The reasonable accommodation requirement is easily applied in a case of an actual disability. Where an employee suffers from an actual disability (i.e., an impairment that substantially limits a major life activity), the employer cannot terminate the employee on account of the disability without first making reasonable accommodations that would enable the employee to continue performing the essential functions of his job. Thus, it is enough to make out a prima facie case of disability discrimination that an individual is actually disabled, that he can perform the essential functions of his job with or without reasonable accommodations, and that his employer discriminated against him on account of his disability. This application of the reasonable accommodation requirement is perfectly consistent with the ADA's goal of protecting individuals with disabling impairments who nonetheless can, with reasonable efforts on the part of their employers, perform the essential functions of their jobs.

The reasonable accommodation requirement makes considerably less sense in the perceived disability context. Imposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results. Assume, for instance, that Weber's heart condition prevented him from relocating to Akron but did not substantially limit any major life activity. Absent a perceived disability, defendants could terminate Weber without exposing themselves to liability under the ADA. If the hypothetical is altered, however, such that defendants mistakenly perceive Weber's heart condition as substantially limiting one or more major life activities, defendants would be required to reasonably accommodate Weber's condition by, for instance, delaying his relocation

to Akron. Although Weber's impairment is no more severe in this example than in the first, Weber would now be entitled to accommodations for a non-disabling impairment that no similarly situated employees would enjoy.

No court has squarely addressed whether employers must reasonably accommodate perceived disabilities, and the two circuits that have indirectly considered the issue have suggested different outcomes. In *Katz v. City Metal Co.*, *supra*, plaintiff sought an accommodation from his employer in the form of a reduced work schedule after suffering a heart attack. 87 F.3d at 29. The employer denied plaintiff's request for an accommodation and terminated his employment. *Id.* Plaintiff sued under the ADA and, at the end of his case, the court granted the employer's motion for judgment as a matter of law, holding that the plaintiff had failed to show that he was disabled. *Id.* The First Circuit reversed, finding sufficient evidence for the plaintiff to reach the jury under a perceived disability theory and concluding that whether plaintiff would have been able to perform his job if his employer had granted his request for an accommodation was an issue for the jury to decide. *Id.* at 32-33.

The Third Circuit faced a similar situation in *Deane*, *supra*. Plaintiff was working as a nurse when she tore the cartilage in her wrist and missed nearly a year of work. 142 F.3d at 141. Plaintiff's doctor eventually released her to return to "light duty" work but limited her lifting to 15-20 pounds or less. *Id.* Defendants determined that plaintiff could not be accommodated in any position available and terminated her. *Id.* Plaintiff focused her case on her employer's perception that she was disabled and argued that

she was entitled to reasonable accommodations either in her previous position or another position, so long as no heavy lifting would be required. *Id.* at 142. The district court entered summary judgment for defendants. *Id.*

On appeal, a divided panel of the Third Circuit held that: (1) in order to be considered qualified under the ADA, a "regarded as" plaintiff must show that she is able to perform *all* the functions of the relevant position; and (2) a "regarded as" plaintiff is not statutorily entitled to accommodation from her employer. *Id.* at 140-41. The Third Circuit granted rehearing en banc and reversed the panel, holding that a plaintiff is qualified under the ADA so long as she is able to perform the *essential* functions of the relevant position. Because this holding alone required remand, the court did not reach "the more difficult question . . . whether 'regarded as' disabled plaintiffs must be accommodated by their employers if they cannot perform the essential functions of their jobs." *Id.* at 148-49 n.12.

The Third Circuit nonetheless discussed this issue in some detail and acknowledged that there is "considerable force" to the argument that "regarded as" disabled plaintiffs are not entitled to accommodations. *Id.* Among the court's concerns were that adopting plaintiff's interpretation of the ADA would: "(1) permit healthy employees to, through litigation (or the threat of litigation) demand changes in their work environments under the guise of 'reasonable accommodations' for disabilities based upon misperceptions; and (2) create a windfall for legitimate 'regarded as' disabled employees who, after disabusing their employers of their misperceptions, would nonetheless be entitled to

accommodations that their similarly situated co-workers are not, for admittedly non-disabling conditions." *Id.*; *see also Taylor v. Pathmark Stores, Inc.*, 1999 WL 312384, at *15 (3d Cir. 1999) ("[I]t seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability, when other impaired but not disabled people are not entitled to an accommodation.").

The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees. Accordingly, we hold that "regarded as" disabled plaintiffs are not entitled to reasonable accommodations and that the district court did not err in failing to give a reasonable accommodation instruction.

4. Burden-shifting and mixed motive

Weber's final claims of instructional error are that the district court should have instructed the jury on the burden-shifting framework set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and should have given a mixed motive instruction. Although Weber lists these alleged errors in his opening brief, he fails to discuss either until his reply brief. Accordingly, these claims have been waived. *See United States v. Brown*, 108 F.3d 863, 867 (8th Cir. 1997).

In any event, these claims fail on the merits. We have previously rejected the claim that a district court should

instruct the jury on the *McDonnell-Douglas* burden-shifting framework. *See Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("Reference to [the *McDonnell-Douglas* burden-shifting] analysis is not necessary . . . or even recommended. The burden-shifting analysis is simply a procedural framework that progressively focuses the inquiry on the question of whether a material issue of discrimination in fact exists.") (citations omitted). And the district court did instruct the jury that defendants should be found liable if Weber's alleged disability was "a motivating factor" behind their actions. A more specific mixed-motive instruction was not required.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court judgment in all respects.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, FOR A NEW TRIAL DATED AUGUST 12, 1998 AND FILED AUGUST 13, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-95-862 (JRT/RLE)

DAVID WEBER,

Plaintiff,

v.

STRIPPIT, INC.; and IDEX, CORPORATION,

Defendants.

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, FOR A NEW TRIAL

* * *

This matter is before the Court on plaintiff's post-trial motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), or in the alternative, for a new trial under Fed. R.

Civ. P. 59(a). Following an approximately two week trial, the jury returned a verdict in favor of the defendants on plaintiff's disability and age discrimination claims brought pursuant to the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* ("ADA"), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* ("ADEA"), and the Miñnesota Human Rights Act, Minn. Stat. §§ 363.01-363.15 ("MHRA"). Plaintiff's motion is premised on a number of alleged errors. For the reasons set forth below, the motion is denied.

I. JURY INSTRUCTIONS

Plaintiff contends that several of the Court's jury instructions misstated the law and prejudiced him. Plaintiff also argues that he was prejudiced because the Court failed to give certain requested instructions.

Jury instructions are not erroneous if they, as a whole, fairly and adequately instruct the jury as to the substantive law. *See, e.g., Cummings v. Malone*, 995 F.2d 817, 822 (8th Cir. 1993). The form and language of jury instructions is left to the sound discretion of the Court provided they correctly state the law. *See, e.g., Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir.), *cert. denied*, 506 U.S. 1014 (1992).

A. Instruction 22 Concerning Plaintiff's Perceived Disability Claim

Plaintiff argues that Instruction 22 was erroneous because 1) it required plaintiff both to prove an actual

disability and that defendants' were mindful of the legal definition of disability, and 2) it misled the jury by focusing on work as a major life activity. The Court disagrees and holds that the instruction fairly and adequately reflects the Eighth Circuit's law regarding "perceived disability" claims under the ADA and the MHRA.

Instruction 22 stated as follows:

> Defendants "regarded plaintiff as having a disability" if defendants perceived and treated plaintiff as having a physical or mental impairment that substantially or materially limits one or more of the major activities of life, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sitting, standing, lifting, reaching, or working.
>
> Plaintiff need not be actually disabled for defendants to regard him as having a physical or mental impairment. However, simply because defendants may have known of plaintiff's health problems is insufficient to find they regarded him as having a disability. Plaintiff must prove by a preponderance of the evidence that defendants regarded plaintiff as having a physical impairment that substantially or materially limits one or more major life activities and treated him as having such an impairment.

Appendix B

To substantially or materially limit a major life activity means to render an individual unable to perform a basic function that the average person in the general population can perform, or to significantly restrict the condition, manner, or duration under which an individual can perform a particular major life activity as compared to an average person in the general population. The following factors are considered in determining whether a person is substantially or materially limited in a major life activity: (1) the nature and severity of the impairment; (2) its duration or anticipated duration; and (3) its long-term impact. Again, it is your duty to determine whether defendants regarded plaintiff as having a physical impairment that substantially or materially limits a major life activity, not whether plaintiff actually has such an impairment.

"Working" is one of the major life activities you may consider. The inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working. The impairment must prevent the individual from performing an entire class or broad range of jobs as compared to the average person possessing comparable training, skills, and abilities. Factors which may be considered in determining whether an impairment prevents an individual from performing an entire class or broad range of jobs include: the number and type of jobs from which the individual is disqualified;

> the geographical area to which the individual has access, and the individual's job training, experience, and expectations. Thus, in order to find that defendants regarded plaintiff as having a physical impairment that substantially or materially limited the major life activity of working, you must find that plaintiff has proven by a preponderance of the evidence that defendants perceived plaintiff as being unable to perform a broad class or broad range of jobs as compared to the average person.

Contrary to plaintiff's contention, this instruction did not require the jury to find that plaintiff had an actual disability in order to conclude that defendants "regarded plaintiff as having a disability." The instruction expressly informed the jury that defendants "regarded plaintiff as having a disability" if "defendants *perceived and treated* plaintiff as having a physical or mental impairment that substantially or materially limits one or more of the major activities of life." The instruction also cautions that "[p]laintiff need not be actually disabled for defendants to regard him as having a physical or mental impairment." This language was more than sufficient to make clear to the jury that they did not need to find that plaintiff was actually disabled.[1]

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1. Because Instruction 22 is not an "actual disability" instruction, the Court also rejects plaintiff's contention that it erred in not instructing the jury on the issue of reasonable accommodation. Moreover, although plaintiff does not expressly contend that the Court erred in concluding — at the close of plaintiff's case — that his "actual disability" claim failed as a matter of law, he seems to

(Cont'd)

Moreover, the requirement that defendants perceived and treated plaintiff "as having a physical or mental impairment that substantially or materially limits one or more of the major activities of life" conforms with Eighth Circuit law. *See, e.g., Wooten v. Farmland Foods*, 58 F.3d 3 82, 385 (8th Cir. 1995) ("A person is 'regarded as having' an impairment that substantially limits the persons major life activities when other people treat that person as having a substantially limiting impairment."). As the circuit court has made clear, to regard a plaintiff as disabled under the ADA (or the MHRA), a defendant must perceive more than that the plaintiff has health problems. The defendant must perceive the plaintiff as having an impairment covered under the ADA or MHRA, or, in other words, as having an impairment that substantially or materially limits one or more of the major activities of life. *See, e.g.*, 42 U.S.C. § 12102(2)(A) and (C); *Gerdes v. Swift-Eckrich, Inc.*, 125 F.3d 634, 637-38 and n.4 (8th Cir. 1997) (stating one is disabled under the ADA where he is regarded as having an impairment that "substantially limits one or more . . . major life activities. . . ."); *Wooten*, 58 F.3d at 385 ("[A] person is considered disabled for purposes of the ADA if that person is 'regarded as having' an impairment that 'substantially limits' a 'major life activit[y].' ").

Finally, the Court disagrees that this instruction prejudiced defendant by defining the life activity of

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(Cont'd)
suggest as much in various places in its memoranda. For the reasons articulated by the Court at the close of plaintiff's case, plaintiff was not entitled to present this claim to the jury because there is no evidence in the record supporting a finding that he was actually disabled, as that term is defined under the ADA and MHRA.

"working." The Court was obliged to define the term "working" to ensure the jury interpreted this term consistently with its very specific definition in the statutes, regulations, and Eighth Circuit law. *See, e.g.*, *Snow v. Ridgeview Med. Ctr.*, 128 F.3d 1201, 1206-07 (8th Cir. 1997) (setting forth the definition of what constitutes a substantial limitation in a major life activity and, more particularly, a substantial or material limitation in the life activity of working); *Gerdes*, 125 F.3d at 637-38 (same); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 617 (8th Cir. 1997) (same). To ensure that the jury did not focus simply on this life activity, the first sentence of the instruction lists numerous examples of life activities, work being the last listed among them. Additionally, in the paragraph in which "working" is defined, the instruction states that this activity is "one of the major life activities you may consider." The Court believes the instruction as a whole adequately informed the jury that working was only one of the life activities to be considered.

B. Instruction 19

Plaintiff argues that the Instruction 19 was erroneous because, he contends, it describes for the jury what types of reasons are not discriminatory, but fails to inform the jury that if he proved the stated reasons were not to be believed, it could find in his favor. The Court disagrees.

As an initial matter, the language of this instruction is derived from section 5.94 of the Model Civil Jury Instructions for the Eighth Circuit (1998) ("Eighth Circuit Models") and Eighth Circuit case law. *See Walker v. AT&T*

Technologies, 995 F.2d 846, 948-50 (8th Cir. 1993); *Blake v. J.C. Penney Co.*, 894 F.2d 274, 281 (8th Cir. 1990). In addition, the last paragraph in this instruction advises the jury that although it may not find in favor of plaintiff simply because it disagrees with the reasons given by defendants, it may consider "whether the reasons stated by defendants for their decisions or actions are the real reasons for those decisions or actions." Likewise, Instructions 23 and 26 — which are "pretext instructions" based on section 5.95 of the Eighth Circuit Models — expressly provide that if plaintiff has proved that the defendants' stated reasons for their actions are not the true reasons for their actions, the jury may find these reasons are pretext to hide discriminatory motivation. Thus, the language of these three instructions fairly and adequately instructed the jury that if it did not believe defendants' proffered reasons, it could infer a discriminatory motivation.

C. Mixed Motive Instruction

Plaintiff claims the Court erred in failing to give a mixed motive instruction. Although plaintiff's argument is confusing, he appears to contend that 1) the Court failed to give a "motivating factor" instruction as required by Minnesota law, and 2) the Court should have instructed the jury that defendants had the burden of proving a nondiscriminatory reason for their actions because plaintiff established a prima facie case of discrimination. Both arguments must be rejected.

In Instructions 21 and 25, the Court in fact did present the jury with a "motivating factor" test for plaintiff's

disability and age discrimination claims. The language of these instructions was drawn primarily from sections 5.11, 5.91, and 5.93 of the Eighth Circuit Models, and the Court believes they correctly articulated the law.

Plaintiff has cited no authority for the proposition that because he established a prima facie case of discrimination, he was entitled to an instruction that the burden is on defendants to come forward with a legitimate, non-discriminatory reason for their decisions and actions. In this case, where there was a clear factual dispute over whether defendants' decisions and actions were motivated by discriminatory animus, the jury must decide the ultimate issue of whether such animus was a motivating factor in defendants' decisions or actions. *See, e.g.*, *Williams*, 964 F.2d at 731 (stating that the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should not be submitted to the jury, rather, "the factfinder should proceed to the specific question of whether the action of the employer was discriminatory"); Eighth Circuit Models § 5.91, Committee cmts. (stating that the jury should focus on the ultimate issue and that it is inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas*). Here, the jury determined that plaintiff had not proved the elements necessary for finding that discriminatory animus motivated defendants to terminate or constructively discharge plaintiff.

Only if the jury concludes that discrimination was a motivating factor for such an act, must it determine whether defendants have proved that they would have undertaken the same decisions or actions regardless of plaintiff's age or

alleged perceived disability.[2] Thus, the Court finds Instructions 21 and 25 fairly and adequately instructed the jury on elements of plaintiff's disability and age discrimination claims.

D. Duty to Investigate Instruction

Plaintiff also contends that the Court erred in refusing to instruct the jury on defendants' duty to investigate his claims of discrimination. The Court disagrees. It is undisputed that the defendants themselves, through the acts of their principals, undertook the decisions and actions that form the basis of plaintiff's claims. Thus, if plaintiff had suffered disability or age-based discrimination, defendants would have been directly responsible. In these circumstances, the duty to investigate is entirely irrelevant.

E. Pension Rights Instruction

Finally, plaintiff contends that the Court erred in refusing to instruct the jury on the issue of whether defendants had just cause to interfere with plaintiff's pension rights under Minn. Stat. § 363.03, subd. 9. The Court agrees with defendants that it if were to address the issue, it likely would find that this provision of Minnesota law is preempted by

---

2. The parties agreed to leave this second step out of the instructions. It is worth noting that the omission of this step in no way prejudiced plaintiff because plaintiff failed to meet its burden under the first step. Moreover, the inclusion of the second step in the instructions merely would have provided *defendants* with an alternative argument, had the jury found them to have acted with discriminatory motivation.

the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § § 1001, *et seq. See, e.g., Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 108 (1983) (holding state employee benefit laws which prohibit pension practices not prohibited by federal law are preempted).

Nevertheless, the Court need not reach the ERISA question because it concludes that it acted properly in withholding this issue from the jury. Plaintiff raised this theory for the first time in his proposed jury instructions. Because the clear focus of the case was on plaintiff's disability and age claims, and because the pension claim was neither pleaded nor raised with the Court prior to the parties' pretrial submissions, it would have prejudiced defendants to allow the claim to go forward. The Court therefore concludes that it acted within its discretion in refusing to let this theory go to the jury.

II. SUFFICIENCY OF THE EVIDENCE

Plaintiff argues that he is entitled to a judgment as a matter of law because there was insufficient evidence presented at trial for the jury to find that defendants had a non-discriminatory reason for their actions and decisions. In particular, plaintiff contends that defendants offered no reason why, at the particular time at issue, defendants did not allow plaintiff to remain in Minnesota for a short time to receive follow-up medical care.

The Court's task at this stage is to examine the sufficiency of the evidence presented during trial, not to substitute its judgment for that of the trier of fact. *See Ryther*

v. Kare II, 864 F. Supp. 1510, 1519 (D. Minn. 1994), *aff'd*, 108 F.3d 832 (8th Cir.) (en banc), *cert. denied*, 117 S. Ct. 2510 (1997). Under this standard, the Court finds that there clearly was sufficient evidence presented for the jury to conclude that plaintiff's age and alleged perceived disability were not factors in any of defendants' actions or decisions during the relevant time period. Likewise, there was sufficient evidence to create a fact dispute whether plaintiff resigned voluntarily, rather than being terminated or constructively discharged. Thus, plaintiff is not entitled to judgment as a matter of law.

III. TORTIOUS INTERFERENCE AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS

Plaintiff contends the Court erred in dismissing, prior to trial, his tortious interference with contract claims against the individual defendants and his intentional infliction of emotional distress claim. In an Order dated January 21, 1998, the Court concluded that both claims fail as a matter of law. Neither the evidence presented at trial nor the arguments proffered in plaintiff's post-trial memoranda persuades the Court that dismissal of these claims was inappropriate. Thus, for the reasons set forth in the January 21 Order, the Court denies plaintiff's motion for a new trial on these claims.

IV. JUROR STRIKES

Lastly, plaintiff claims defendants violated his right to a representative jury because, in his view, defendants' counsel "systematically and intentionally" exercised all

peremptory challenges to exclude prospective jurors over the age of fifty. It is undisputed that defendants used their three peremptory challenges to strike jurors over fifty.

In *Batson v. Kentucky*, the Supreme Court held that the equal protection clause forbids prosecutors from striking jurors solely on account of their race. 476 U.S. 79, 93-94 (1986). Thereafter, the Court extended *Batson*'s reach to counsel participating in jury selection in civil cases and to peremptory challenges based on gender. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991) (civil cases); *J.E.B. v. Alabama*, 511 U.S. 127, 141-42 (1994) (strikes based on gender). Plaintiff has provided no authority, however, for the proposition that the protections set forth in *Batson* are applicable to juror strikes based on age.

The Court concludes it is unlikely that the Supreme Court would expand the *Batson* principle to prohibit peremptory challenges based on age. The *Batson* rule is premised on the Equal Protection Clause of the Fifth and Fourteenth Amendments. *See* 476 U.S. at 93-94. Although certain age classifications have received statutory protection, age, unlike race and gender, is not a classification subject to strict or heightened scrutiny under the Equal Protection Clause. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976). Moreover, courts that have confronted this issue have refused to recognize such an expansion of *Batson*'s reasoning. *See Barker v. Yukins*, 993 F. Supp. 592, 605 n.12 (E.D. Mich. 1998) (finding it unlikely that the Supreme Court would expand *Batson* to cover age-based, strikes); *see also United*

States v. Cresta, 825 F.2d 538, 544-45 (1st Cir. 1987) (concluding age-based strikes of young adults is not unlawful under *Batson*), *cert. denied*, 486 U.S. 1042 (1988); *State v. Everett*, 472 N.W.2d 864, 869 (Minn. 1991) (suggesting age-based strikes are not violative of *Batson* because age has not been recognized as a suspect classification).[3] Thus, the Court believes plaintiff cannot base a representative jury challenge on alleged age-based peremptory strikes.

Moreover, even if *Batson* and its progeny applied to age-based strikes, the Court believes defendant had sufficient age-neutral reasons for striking the three jurors. Defense counsel requested that one of the three jurors be struck for cause because her brother-in-law had made claims of age discrimination against a former employer. After the Court denied this request, defendant struck the juror. In addition, at the time plaintiff made his *Batson* challenge, the Court concluded that the content of three jurors' answers during *voir dire* could support defense counsel's view that those jurors may be predisposed to rule against defendants. The Court sees no reason to upset this finding. For these reasons, this aspect of plaintiff's motion for a new trial also is denied.

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3. It is also worth noting that research has revealed numerous cases in which courts have found no race or gender-based *Batson* violation because counsel had articulated juror age and other factors as "legitimate" reasons for striking jurors. *See, e.g.*, *Howard v. Moore*, 131 F.3d 399, 408 (4th Cir. 1997) (stating, in the context of concluding that the prosecutor's strikes were not race-based, that "age is an acceptable race-neutral factor") (citing *United States v. Jackson*, 983 F.2d 757, 762 (7th Cir. 1993)).

Appendix B

ORDER

Based on the foregoing, the submissions of the parties, and all of the records, files, and proceedings herein, **IT IS HEREBY ORDERED** that plaintiff's post-trial motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), or in the alternative, for a new trial under Fed. R. Civ. P. 59(a) [Docket No. 155] is **DENIED**.

Dated: August 12, 1998.

s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge

APPENDIX C — RELEVANT STATUTE

42 U.S.C. § 12102

* * *

(2) Disability

The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * * *

Supreme Court, U.S.
FILED
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(2)

No. 99-732

IN THE

Supreme Court of the United States

DAVID WEBER,

Petitioner,

v.

STRIPPIT, INC., IDEX CORPORATION, JAMES BLACKSTONE, ROD J. SIMEONE, and THOMAS G. HOAG,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petitioner fails to include Rod J. Simeone and Thomas J. Hoag who were parties to the proceeding.

At the time of the trial, IDEX Corp. was the parent of Strippit, Inc. As of August 25, 1998, Strippit, Inc. was no longer a subsidiary of IDEX Corp. as a result of its having been purchased by its present parent corporation, LVD Company n.v. of Gullegem, Belgium.

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STATEMENT OF THE CASE

Strippit, Inc. ("Strippit") is headquartered in Akron, New York and up until August 25, 1998 had been a unit or subsidiary of IDEX Corporation, ("IDEX") which is purely a holding company located in Illinois. On August 25, 1998, LVD Company n.v. of Gullegem, Belgium became the owner of Strippit.

The Petitioner, who was 50 at the time, was hired by Strippit in May of 1990 as an International Sales Manager assigned to Asian markets as well as other parts of the world. At the time of his hire, Petitioner was allowed to remain in Minneapolis, Minnesota during the initial phase of his employment in response to his request for accommodation based on personal family matters. At no time was it ever contemplated that the Petitioner would permanently remain in Minnesota while holding the position of international sales manager since it had been an established practice and policy of Strippit uniformly applied that international sales managers were to be located either in their sales territory or at Strippit headquarters.

In 1992, Strippit management began a series of discussions with Petitioner regarding its requirement that he relocate to corporate headquarters in Akron, New York based on its belief and judgment that Petitioner would be able to perform his job more efficiently and effectively improve his technical knowledge of Strippit's products by such relocation. Before the issue could be resolved, Petitioner suffered a heart attack in 1993 which precluded his relocation for a period of time and Strippit accommodated him during his period of convalescence. Petitioner did fully recover from his heart attack and was authorized by his physician to return to work without any medical restrictions.

Thereafter, Strippit gave the Petitioner the option of relocating to Akron, New York and continuing in his position of international sales manager, or in the alternative, accepting the position of a domestic sales engineer with a sales territory in Minnesota, Iowa and Wisconsin, thereby allowing him to remain in Minneapolis.

Petitioner rejected the option and refused to relocate to Akron, New York in mid-1994 relying on a recommendation of his doctor that he remain in Minnesota for treatment for an additional six months, after which time his condition would be re-evaluated. However, at no time did Petitioner's physician state that the Petitioner was physically or medically unable to relocate to Akron, New York. Instead, he testified at trial that his recommendation was based on "continuity of treatment" and location of medical records.

Throughout the last several months of his employment, Petitioner continually demanded that his business judgment be substituted for that of Strippit's management by insisting that he be allowed to work out of his home in Minneapolis, Minnesota as the international sales manager rather than relocating to Akron, New York.

On October 24, 1994 Strippit informed Petitioner that he must either relocate to Akron, New York or take the domestic sales engineer position in order to continue his employment with the company and that if he rejected these alternatives, the company would consider him to have abandoned or resigned his employment with it.

Since Petitioner did not respond as of October 31, 1994, Strippit considered him to have voluntarily resigned and distributed the functions of his job as international sales manager to other existing employees in the company.

No decision made by Strippit or any of the Respondents herein as relates to Petitioner was motivated in any way by Petitioner's medical or physical condition or his age.

The position taken by the Petitioner that Strippit or the Respondents were "out to get him" after his heart attack because of his age and alleged disability is completely unsupported by the evidence presented at the trial. After reviewing all of Petitioner's evidence presented at the trial, the District Court Judge correctly dismissed his "actual disability" claim. Thereafter, the Respondents presented their evidence in support of their articulated business reasons for the decisions made with respect to Petitioner's employment. The issues of "perceived disability" and age discrimination were submitted to the jury for resolution. The jury rendered a unanimous verdict in finding that the Respondents did not discriminate against the Petitioner because of a perceived disability or because of his age. The United States Court of Appeals for the Eighth Circuit affirmed the judgment entered in favor of the Respondents. As hereinafter detailed, there is no cause for this Court's review of Petitioner's contentions.

A. THE PETITION MISREPRESENTS WHAT ACTUALLY OCCURRED IN THE PRIOR PROCEEDINGS IN THE WAY THE "QUESTIONS PRESENTED FOR REVIEW" ARE STATED.

In the first question presented, Petitioner fails to advise this Court that the Circuit Court of Appeals ruled that Petitioner had failed on appeal to discuss the issues relating to a *McDonnell-Douglas* jury instruction on burden shifting and mixed motive and therefore was deemed to have waived those claims. (page 20a of Appendix A to the Petition). As a result of the Circuit Court's finding and decision, the issues

presented in Petitioner's first question are not properly before this Court.

In the second question presented, Petitioner misrepresents the medical testimony that was presented at trial. The testimony of Petitioner's expert was merely that Petitioner had suffered a coronary attack from which he had recovered and that he suffered from coronary artery disease. At no time did Petitioner's medical expert ever testify that Petitioner has a "physical or mental condition that substantially impairs a major life function" especially since he could not point out any major life function that Petitioner could not substantially perform including working.

Petitioner also misrepresents the district court's basis for granting judgment to the Respondents pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The district court, in reviewing Petitioner's evidence found that neither Petitioner nor his physician presented any evidence to establish that Petitioner was substantially limited in any major life activity as a result of his coronary problems. In affirming this judgment, the Circuit Court of Appeals expressly stated that Petitioner's physician "repeatedly failed to identify any particular activity in which Weber was restricted as to condition, manner, or duration as compared to the average person in the general population." (page 11a of Appendix A to the Petition).

The district court did not place undue emphasis on the Petitioner's ability to work in reaching its decision to grant Respondents' Rule 50(a) motion. The district court stated:

> But the issue for purposes of the disability discrimination acts are simply whether he was substantially limited in a *major life activity*. And at this stage, having heard the plaintiff's evidence, the

> Court does not believe that there is a sufficient issue there for the jury. In fact, the jury, in the Court's view, could not find sufficient evidence of a physical impairment that substantially limits *one* or *more* major life activities. (emphasis added) (Trial transcript at p. 1086).

In the third question presented, Petitioner improperly and erroneously characterizes Respondents' use of peremptory challenges as having been "intentionally" based on the ages of the jurors struck and misstates the holding of the Circuit Court of Appeals on this issue. The Circuit Court did not rule "that the intentional exclusion of prospective jurors over age fifty is permissible even in an age discrimination case." What the Circuit Court did say was that it "declined to extend *Batson* to peremptory challenges based on age." The Circuit Court also upheld the district court's findings that the prospective jurors' answers during *voire dire* could support defense counsel's view that the jurors were predisposed to rule against defendants". (page 6a of Appendix A attached to the Petition).

Finally, in the fourth question presented, Petitioner misrepresents the district court's instructions to the jury on the issue of "perceived disability". Instruction 22 given by the district court repeatedly and fairly charged the jury on this issue and it did not "focus" on or, unduly emphasize, "working" as the major life activity to be considered as evidenced by the following:

> Defendants' regarded plaintiff has having a disability if defendants perceived and treated plaintiff as having a physical or mental impairment that substantially or materially limits *one or more* of the major activities of life, such as *caring for oneself, performing manual tasks, walking, seeing, hearing,*

> *speaking, breathing, learning, sitting, standing, lifting, reaching,* or working.
>
> * * *
>
> Plaintiff must prove by a preponderance of the evidence that defendants regarded plaintiff as having a physical impairment that substantially or materially limits *one or more* major life activities and treated him as having such an impairment.
>
> To substantially or materially limit a major life activity means to render an individual unable to perform *a basic function* that the average person in the general population can perform...
>
> * * *
>
> "Working" is *one* of the major life activities you may consider.
>
> (emphasis added) (pages 24a and 25a of Appendix B attached to the Petition).

The Circuit Court of Appeals did not rule that "the focus on working was not error" as alleged by petitioner. It expressly found that the district court had not focused on "working" as a major life activity in its charge to the jury wherein it stated:

> Additionally, the district court did not limit its instruction to the major life activity of working. Rather, the court instructed the jury that it should find Weber disabled if defendants regarded his impairment as substantially limiting *any* major life activity, 'such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sitting, standing, lifting,

reaching or working'. Thus, 'the instructions taken as a *whole* and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury'. (citation omitted) (emphasis added) (at page 14a of Appendix A attached to the Petition).

B. PETITIONER MISREPRESENTS AND EXAGGERATES THE FACTUAL HISTORY OF THIS CASE.

Petitioner alleges that he suffered "cardiac arrest" but no evidence establishing such was ever produced at the trial.

Petitioner states that his "condition did not stabilize" and that he continued to experience "substantial problems throughout the remainder of his employment". This allegation is contrary to the testimony given by plaintiff's personal physician at the trial wherein he testified that plaintiff suffered from coronary artery disease but that such condition "wasn't affecting major life functions in such a way that I had to say, Mr. Weber, you can't work." (Trial transcript at pages 549-50).

Petitioner alleges that "Respondents admitted to considering Petitioner's health in making decisions about his employment and continuation thereof" and that Respondents were concerned "that he was not going to be living much longer". These allegations are untrue and are expressly contradicted by the trial testimony of each of the named, individual Respondents wherein they unequivocally testified that at no time did they consider Petitioner's medical condition or age as a factor in making their decisions as to Petitioner's employment. Petitioner not only misrepresents what the actual trial testimony of each of the individual Respondents was, he further compounds the misrepresentation

in the manner in which he sets forth the alleged testimony of Respondent Blackstone in his legal argument in the Petition regarding "perceived disability". Such testimony as set forth has been taken out of context and is piecemealed from the five hundred and eighty-eight (588) pages of pre-trial deposition testimony of Blackstone and not accurately reported. For example, on page 18 of the Petition, Petitioner omits an entire sentence from the answer given by Mr. Blackstone to the first question listed there and inserts the word "health" before the word "lifestyle" in the alleged question. The correct and complete question and answer were in fact as follows:

> Q: So you didn't have any concerns that his heart condition or his lifestyle might cause him to die?
>
> A: I believe that I would consider him not to be a candidate for longevity in perfect health. *But the actual, his actual death or demise, I don't think that was ever a consideration or certainly topic of discussion.* (emphasis added).

What is even more egregious is Petitioner's attempt to mislead this Court by having it appear that the questions and answers set forth on page 18 of the Petition actually were asked and answered in a continuous fashion without any testimony in between when truthfully, that is not the case. Between the first answer and the second question on page 18 of the Petition, the following dialogue took place:

> Q.: Were you concerned as to whether his health conditions would interfere with his ability to perform for Strippit?
>
> A.: I don't think so. I think the concern was that his doctors or doctor would give him the permission or authority to resume his previous business activities.

Q.: Could you explain a little bit more fully for me what you mean by the last part, the concern that his doctors would give him permission to resume his authority? What did you mean by that?

A.: I'm not sure what restrictions his doctor had on him at that point relative to frequency of international travel or relative to his ability to relocate.

Petitioner alleges that the training that he was required to undergo was "useless for his position". This is totally untrue and the reasons and necessity for such training were put into evidence by the Respondents at the trial.

Petitioner alleges that his doctors informed Respondents that he should remain in Minnesota for six months for "medical reasons" and that it was "made clear to Respondents that relocation presented serious health concerns for him". These allegations or misstatements are contradicted by Petitioner's physician who testified at trial that there were no medical restrictions placed on Petitioner in carrying out his employment and that the delay in relocation was more a matter of convenience and for "medical *continuity*." (emphasis added)

Petitioner references "doctors" as having "indicated that Petitioner's case was complicated and needed consistent treatment" and that his "life was endangered by the stress of moving and that stress triples the chances of relapse". It is pointed out that only one doctor, Bruce Johnson, testified on behalf of Petitioner. Dr. Johnson was an internist and not a cardiologist. Petitioner never called the cardiologists who had treated him for his coronary condition. Dr. Johnson unequivocally testified that Petitioner could in fact travel in

1994 and perform his job functions without any limitations. Petitioner did not present any evidence establishing the aforesaid quoted claims.

Petitioner's allegations that he has "permanent daily substantial impacts on many major life activities" was and is not supported by the evidence produced at trial. Petitioner's personal physician repeatedly failed to identify any particular major life activity in which Petitioner was restricted as to condition, manner or duration as compared to the average person in the general population.

Petitioner's allegation that he "is frequently totally disabled requiring hospital intensive care" is totally unsupported by the evidence produced at trial and is a misrepresentation of what was actually established by legally competent evidence produced at the trial.

Petitioner's claim that "Dr. Johnson, when given the legal definition of the ADA, testified that Petitioner does have 'physical or mental impairments' which 'substantially limit' 'one or more major life activities'" belies the fact that upon further examination, Dr. Johnson was unable, and repeatedly failed, to identify any particular major life activity in which Petitioner was restricted as to condition, manner, or duration as compared to the average person in the general population.

Lastly, Petitioner misrepresents what the evidence at trial established as to Petitioner's medical history when he states that he "had numerous, acute episodes of total disability where he was hospitalized in intensive care about a dozen times." The evidence established that on a few occasions, Petitioner went to the hospital emergency room complaining of pain which was determined to be caused by esophageal reflux and not his coronary condition and he was not admitted to the hospital let alone intensive care. Petitioner was also

diagnosed as suffering from "chronic anxiety" arising out of his relationship with his daughter and his wife's medical condition but he was not hospitalized for this condition. The evidence further established that Petitioner had fully recovered from his heart attack suffered in 1993 and that his medical condition thereafter did not substantially limit any major life activity of Petitioner.

REASONS FOR DENYING THE WRIT

A. The *McDonnell-Douglas* Test

The Circuit Court of Appeals expressly found that Petitioner had not properly raised that issue on the appeal to it and therefore Petitioner had waived this claim. As a result of this waiver, this issue is not properly before the Court and need not be considered.

Even if it were determined that a waiver had not occurred, the district court and the Circuit Court of Appeals were correct in holding that an instruction on the *McDonnell-Douglas* test need not be given to the jury. The purpose of the *McDonnell-Douglas* burden shifting analysis is to assist the trial judge to:

> determine whether the litigants have created an issue of fact to be decided by the jury. In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.8 (1981).

The district court properly assessed the burden of production after all of the evidence had been presented by the parties. Notwithstanding that Petitioner had made out a prima

facie case of discrimination, the Respondents did everything that was required of them by offering evidence that articulated and established legitimate business reasons for their actions. By doing so, Respondents met their burden of production as a matter of law and the presumption raised by Petitioner's prima facie case was rebutted and dropped from the case. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1995). The issue of discrimination then became a pure question of fact for the jury to decide based on all of the evidence presented. An instruction on the burden shifting analysis would not have provided anything of substance to aid the jury in carrying out its responsibilities. At this point in the proceedings, the only determination the jury had to make was whether the proffered explanation by the Respondents was pretextual or not and whether the plaintiff had met his burden of proving intentional discrimination by the Respondents.

B. Actual Disability

As previously pointed out in Respondents' Statement of the Case, Petitioner distorts the record of the trial proceedings by selecting bits and pieces of testimony given by Petitioner's physician on direct examination. He fails to set forth the testimony elicited on cross-examination of the doctor wherein and whereby it was clearly and unequivocally established that the doctor repeatedly was unable to identify any particular major life activity in which Petitioner was restricted as to condition, manner, or duration as compared to the average person in the general population. The district court had a full opportunity to review all of Petitioner's evidence in support of his claim and especially the testimony of his physician, which testimony taken as a whole, clearly established that Petitioner, as a matter of law, did not have an actual disability as defined by the ADA. Petitioner's fact bound claim relating to this issue does not warrant review by this Court.

C. Age - *Batson* Challenge

Petitioner attempts to extend the Constitutional protection of the Equal Protection Clause to a classification that does not fall within that clause. It has been repeatedly stated "that age is not a suspect classification under the Equal Protection Clause". *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). Since age does not rise to the level of a constitutional protection, the principle enunciated in *Batson* does not apply to the use of peremptory challenges allegedly based on age. Nevertheless, even if it were assumed *arguendo* that *Batson* did apply, the district court expressly found that defense counsel for the Respondents "had sufficient age-neutral reasons for striking the three jurors". (Page 35a of Appendix B attached to the Petition). "[T]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal..." *Hernandez v. New York*, 500 U.S. 352, 364 (1991). Therefore, Petitioner's fact bound claim on this issue does not warrant review by this Court.

D. Perceived Disability

Petitioner's argument on this issue is curious to say the least. He states that his claim of "disability" or "perceived disability" was not based on "working" and therefore, no instruction to the jury on "working" should have been given. However, Petitioner was unable to present any evidence establishing that his impairment of coronary artery disease substantially limited any other major life activity as that term is defined in Section 1630.2(i) of 29 CFR Ch. XIV (7-1-98 Edition). As previously pointed out, Petitioner's medical witness "repeatedly failed to identify any particular activity in which Weber was restricted as to condition, manner, or duration as compared to the average person in the general population". (page 11a of Appendix A attached to the

Petition). Therefore, if "working" was not the major life activity to be considered, Respondents were entitled to judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Nevertheless, Petitioner once again misapplies the meaning and intent of the regulations set forth under 29 CFR Ch. XIV (7-1-98 Edition).

Section 1630.2(g) of said regulations expressly states:

> The definition of the term 'disability' is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this part. An individual is considered to have a 'disability' if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, * * *, (3) is regarded by the covered entity as having *such an impairment*. (emphasis added)

The term "such an impairment" refers to and incorporates the definition of "disability" as set forth in the first of the three parts described in Section 1630.2(g).

At the trial, the Petitioner failed to present any evidence establishing that the Respondents "regarded" or "perceived" Petitioner as having a "disability" as defined under the ADA. The evidence presented on behalf of the Respondents clearly established the contrary, *i.e.*, that Petitioner was not "disabled" or "perceived" or "regarded" by the Respondents as being "disabled".

Respondents refer the Court to its statements relating to Petitioner's misrepresentations set forth in the "Questions Presented" on the issue of the district court's instructions to the jury on "perceived disability" and the issue of whether the

court "focused" on "working" as the major life activity as it related to Petitioner's claim of "perceived disability".

The jury was given the task of resolving the factual issues of whether the Respondents "perceived" or "regarded" Petitioner as having a "disability" as defined under the ADA and the EEOC's regulations. The jury unanimously found for the Respondents. The jury's factual determinations should be deemed as being final. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

CONCLUSION

Based on the foregoing, this case does not merit further review by this Court and the Petition should be denied.

Respectfully submitted,

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